No. 14,805

United States Court of Appeals

For the Ninth Circuit

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Appellant,

vs.

JOSEPH A. SICILIANO,

Appellee.

JOSEPH A. SICILIANO,

Appellant,

vs.

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a Corporation,

Appellee.

OPENING BRIEF OF JOSEPH A. SICILIANO, CROSS-APPELLANT AND APPELLEE.

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OPENING BRIEF OF JOSEPH A. SICILIANO, CROSS-APPELLANT AND APPELLEE.

STATEMENT OF PLEADINGS AND JURISDICTION.

This is an action for the dissolution of a partnership organized and operating under the laws of the territory of Guam. The Amended Complaint in the action, set forth in full beginning on Page 25 of Volume I of the Transcript of Record, was filed in the

District Court of Guam pursuant to Section 62 of the Code of Civil Procedure of the territory of Guam which gives jurisdiction to the District Court in this cause by virtue of the fact that the assets of the partnership which is the subject of the action exceed the sum of Two Thousand Dollars ($2,000.00).

Upon judgment being entered for the plaintiff in the action, the same was appealed to this Court. The United States Court of Appeals for the Ninth Circuit has jurisdiction to hear an appeal from the final judgment of the District Court of Guam. (28 U.S.C.A. Sections 1291 and 1294.)

STATEMENT OF CASE.

Plaintiff and the defendant executed a partnership agreement for the operation of a business in Guam on the 23rd day of June, 1952. Said agreement is set forth in full as Exhibit A to plaintiff's amended complaint and the text thereof appears beginning on page 8 of Volume I of the Transcript of Record. The parties also executed on June 23, 1952, a supplemental agreement providing for additional details of the partnership operation, and the full text of this supplemental agreement appears in Volume I of the Transcript of Record beginning at page 51 where it was set forth as Exhibit B to the defendant's answer. The execution of these agreements is admitted by both parties. Plaintiff invested the amount of money required by the agreement and otherwise fully performed the terms thereof.

The plaintiff, Joseph A. Siciliano, is an individual but is also the dominant stockholder of a corporation operating in Guam known as Pacific Enterprises, Inc., which owns, manages and operates a bakery, a restaurant, a farm and a luxury restaurant also utilized as a night club. Plaintiff's corporation has also had experience in owning and operating ice cream manufacturing plants, cafeterias and snack bars.

The defendant is a corporation organized under the laws of the State of Washington, but solely for the purpose of doing business in the territory of Guam and other Pacific islands. It qualified to do business as a foreign corporation in the territory of Guam and executed the copartnership agreement as such corporation. Some effort was made by the defendant to avoid its obligations under the partnership contract on the ground that it was a corporation and not authorized to execute partnership agreements. However, this effort was characterized by the trial court as a "fiction" (Transcript of Record, Volume I, page 100) in view of the fact that the defendant took full advantage of the benefits of the contract and in view of the generally accepted rule that a corporation may be held liable as a partner to prevent injustice, as well as the general rule that transactions of this sort will be adjudged joint ventures wherein the parties have the same rights and liabilities of partners. The trial and the judgment of the court, therefore, proceeded under the statutes of Guam pertaining to partnerships.

The basic facts in the case are for the most part not seriously controverted, it appearing that almost

immediately after the execution of the partnership agreement the president of the defendant corporation left Guam for his home in Seattle, Washington. The plaintiff, Joseph A. Siciliano, with the help of his managers and technicians employed by Pacific Enterprises, Inc., undertook the management and operation of the business known as the "Dairy Queen of Guam" which was primarily engaged in the manufacture and sale of ice cream products. There was a wealth of evidence as to the difficulties in undertaking a business of this character in the then-existing situation in Guam, but it appears sufficient to state here that the difficulties were largely overcome and the business operated at a very substantial profit during all of the time it was under the control of the plaintiff or the plaintiff's management personnel. The ice cream store actually opened on June 22, 1952 (one day before the actual execution of the partnership agreement which, however, had been agreed upon and was being reduced to writing concurrently with the physical efforts of the parties to open the business to the public). Plaintiff transferred trained personnel from his own corporation to the partnership business and with the aid of his management personnel, who remained upon the payroll of his corporation at no expense to the partnership, worked at the ice cream store during its first critical days and placed it in full operating condition.

After approximately ten (10) days plaintiff left the territory of Guam, leaving the operation of the ice cream store in charge of his corporate management

personnel, who were then and at all other times material to this action paid salaries by Pacific Enterprises, Inc. Plaintiff did not return to Guam for approximately two (2) years but directed his affairs in the territory through the management personnel of his corporation by correspondence and telephone calls with his personnel. Plaintiff thus provided at his own expense and not at the expense of the partnership trained supervision of the partnership business during all times that the same was under his control.

Management of the partnership ice cream store continued under the supervision of plaintiff's personnel until May 1953. It is admitted by all parties that gross sales as of May 31, 1953, were Ninety-one Thousand Eight Hundred Six Dollars and Sixty-seven Cents ($91,806.67) and the net profit for the same period was Thirty-one Thousand Four Hundred Three Dollars and Forty-seven Cents ($31,403.47). (These figures are derived from a series of monthly reports submitted from Guam to the president of defendant corporation in Seattle and admitted by him to be correct.) During this period minor purchases were made in Guam but substantially all of the money taken in by the business was sent to the president of the defendant corporation in Seattle. In fact, the evidence shows that at least One Hundred Eighteen Thousand Nine Hundred Seventy-nine Dollars and Forty-four Cents ($118,979.44) was sent to Mr. Edward Thompson, president of the defendant corporation in Seattle from Guam. (Transcript of Record,

Volume I, page 207.) No money of any kind was ever paid to the plaintiff, and he has received nothing from the partnership nor from any transaction involving the partnership. (Transcript of Record, Volume I, page 206.)

In April 1953 the son of the president of the defendant corporation came to Guam, ostensibly to aid plaintiff's employees in keeping records of the partnership business, as well as to assume other employment with plaintiff's corporation. However, after the son had become familiar with the details of the operation of the partnership business, he and his father arranged matters so that he took over complete control of the ice cream store operated by the partnership so that, as found by the trial court (Transcript of Record, Volume I, page 102), as of July 1, 1953, the defendant had taken full and complete control of the partnership business and excluded the plaintiff from all participation therein. Furthermore, although the reports were admittedly accurate as of May 31, 1953, the business was under the management of the son of the president of defendant corporation in June 1953 and no report of the activities of the business during that month was ever produced at the trial.

Also, as of July 31, 1953, the president of the defendant corporation rewrote the records of the partnership business, reflecting as of that date only a total gross sales of Ninety-one Thousand Two Hundred Ninety-eight Dollars and Seventeen Cents ($91,-298.17) (Transcript of Record, Volume I, page 223) which is slightly less than the admittedly correct gross

sales as of May 31, 1953. The president of defendant corporation sought to explain this discrepancy by saying that he had rearranged the figures to reflect the period September 1, 1952, to July 31, 1953, instead of to reflect the cumulative sales and profit from the beginning of the operation of the business. No explanation was given as to why this was done and no reconciliation was presented to account for sales and profits from the additional months omitted from this July 31, 1953, statement. No satisfactory accounting or audit was made by the defendant to the plaintiff or to the court for the period beginning May 31, 1953, but such figures as are available indicate that the business made much less money under the defendant's management than it did under the management of plaintiff.

Defendant continued its sole and exclusive operation of the partnership business to and including the date of the trial and as a result of the judgment of the trial court continues such management of the business, fully excluding the plaintiff therefrom and from all participation in the net assets and the profits thereof. Furthermore, the defendant admits that it took all of the partnership funds and placed the same in the defendant's bank account. (Transcript of Record, Volume I, page 238.) In short, the defendant took all of the assets of the partnership, placed the same in its own name and continues to hold and keep the same as its own. Furthermore, some of the profits and funds of the partnership business, after they were placed to the defendant's bank account, were used by

the defendant for the benefit of a competing corporation known as Guam Frozen Products, Inc. (Transcript of Record, Volume I, page 239.) At least Twenty-six Thousand Seven Hundred Forty Dollars and Sixty-three Cents ($26,740.63) was turned over to this competing corporation, the majority of stock of which is owned by the defendant. This competing corporation constructed and operates a business using the designation "Dairy Queen", selling identical products in competition with the store established by the copartnership. Supplies are freely interchanged between the two businesses and in external physical appearance the two are indistinguishable. Also, Norman Thompson, son of Edward Thompson, president of the defendant corporation, continues to act as manager of the partnership store at a salary of Five Hundred Dollars ($500.00) per month while also managing the competing store at a salary of One Hundred Dollars ($100.00) per month. Testimony further indicated that the president of the defendant corporation has been flying to and from Guam, presumably in connection with the business of one or both of these stores, and it is unknown as to how much of his traveling expenses are being charged to either of them. Whether still further funds have been diverted by the defendant corporation into other ventures is unknown to plaintiff.

In substance, the trial court found most of the foregoing facts to be true but held that plaintiff had breached the partnership contract by failing to be physically present on Guam to personally supervise

and operate the ice cream store on Guam instead of delegating the same to his management personnel. The court found that no damage had occurred as the result of such breach, and the plaintiff prevailed as to his share of the profits of the partnership business up to July 1, 1953, but was not allowed profits thereafter nor any share of the assets of the partnership business, except the return of his original investment. To support this conclusion the trial court stated that "* * * the parties dissolved their partnership as between themselves on July 1, 1953, and that plaintiff's interest should be determined as of that date * * *." (Transcript of Record, Volume I, page 108.) These conclusions, plaintiff believes, are in error and, hence, although receiving a money judgment in the court below, has appealed from portions of the judgment.

SPECIFICATIONS OF ERROR.

Joseph A. Siciliano, plaintiff in the court below and cross-appellant and appellee herein, respectfully submits that the lower court erred in the following particulars:

I.

The lower court erroneously held that the partnership agreement between the parties hereto required the plaintiff to be physically present in Guam, and based upon such interpretation, held that the plaintiff breached the agreement by his absence from Guam.

II.

The lower court erred in failing to hold that the defendant breached the partnership agreement as of July 1, 1953, when it excluded plaintiff from participation in the partnership business and took unto itself all of the partnership profits and assets.

III.

The lower court erred in holding that the partnership was dissolved as of July 1, 1953, instead of the date of the court order dissolving the same (February 18, 1955).

IV.

The lower court erred in failing to order a complete accounting of the affairs of the partnership during the period they were directed by the defendant.

V.

The lower court erred in failing to require a winding-up of the partnership business under the control of a receiver and the sale and/or distribution of its assets to the parties.

VI.

The lower court erred in awarding plaintiff only the return of his original investment, plus interest, plus a share of the profits to July 1, 1953, and by failing to allow plaintiff a share of the profits subsequent to July 1, 1953, and a share of the tangible assets of the partnership business.

VII.

The lower court erred in failing to appraise the value of the good will of the partnership business and to award the same to the plaintiff as innocent party to the dissolution.

ARGUMENT.

I. THE LOWER COURT ERRONEOUSLY HELD THAT THE PARTNERSHIP BETWEEN THE PARTIES HERETO REQUIRED THE PLAINTIFF TO BE PHYSICALLY PRESENT IN GUAM, AND BASED UPON SUCH INTERPRETATION, HELD THAT THE PLAINTIFF BREACHED THE AGREEMENT BY HIS ABSENCE FROM GUAM.

The contract does not purport to require the plaintiff to manage the partnership business. It requires him to devote only such time as may be actually agreed upon between the copartners, and there is not a scintilla of evidence that any agreement was ever entered into to require him to devote any time at all to management. The agreement does clearly state that during the period that he shall act as manager he shall receive a specified salary. However, even if the agreement had required him to perform management services, such agreement would have been fully performed by the comprehensive management provided by his management employees who were under his direction and who were never in any way compensated by the partnership. Certainly, there is nothing in the agreement which requires the plaintiff, a man of substantial business affairs, to remain physically present in the territory of Guam to conduct the affairs

of this partnership which was merely the sale of ice cones and mixes.

A. The lower court concluded, as a matter of law, that the partnership was dissolved "* * * by exclusion of the plaintiff because of his breach and acquiescence in such exclusion as of July 1, 1953." (Transcript of Record, Volume I, page 113.)

Plaintiff argues that the partnership agreement, Sections 7, 8 and 13 in particular (Agreement set out in full in Transcript of Record, Volume I, page 8, et seq.), did not create a contractual duty on the part of plaintiff to assume the managership of the partnership business. Rather, it is only provided therein that plaintiff is entitled to a salary if he shall act as manager, and it further provides that "Second partner (plaintiff) agrees to devote such time, as may be mutually agreed upon between copartners, together with his skill and energy * * *". (Section 8 of Articles of Copartnership, Transcript of Record, Vol. I, p. 10.)

Plaintiff contends that there is no evidence indicating such agreement was ever reached. Therefore, plaintiff was not bound to manage the partnership business. In *Autry v. Republic Productions, Inc.* (1947), 30 Cal. (2d) 144, 151, 180 P. (2d) 888, where that plaintiff's contract contained a similar provision agreeing to agree in the future, the court held that such a contract cannot be made the basis of a cause of action, even though, as a part of an undisputed contract, it will be given the effect that the parties intended.

Plaintiff asserts that while it is uncontroverted that he did assume managerial control, there is no evidence to show that the parties agreed, in writing or by conduct, that he, plaintiff, should remain physically present on Guam while acting in such capacity.

In the process of interpreting a contract it is not the proper function of the court to alter the contract or add meaning that is not evident in the wording. (*Vierra v. Shaffer* (1952), 113 C.A. (2d) 768, 248 P. (2d) 992; *Nourse v. Kovacevich* (1941), 42 C.A. (2d) 769, 109 P. (2d) 999.)

Plaintiff contends the lower court did read in and add to the partnership agreement the requirement that plaintiff act as manager. In its memorandum opinion of March 2, 1955 (Transcript of Record, Vol. I, p. 96, 102) the court said as follows:

> "* * * It is inconceivable that if the plaintiff was not obligated to manage the business that no provision would have been made for the appointment of another manager."

The partnership agreement clearly and unambiguously provides that plaintiff could act as manager and, if so, would receive extra compensation. The lower court's contrary finding in its memorandum opinion (Transcript of Record, Vol. I, p. 102) that the agreement was uncertain and ambiguous is not binding upon this Court. (*Brant v. California Dairies, Inc.* (1935), 4 Cal. (2d) 128, 48 P. (2d) 13; *Wachs v. Wachs* (1938), 11 Cal. (2d) 322, 79 P. (2d) 1085.)

Based upon such error, the lower court held that the plaintiff caused the dissolution by failure to re-

main on Guam and manage the partnership business. Plaintiff contends the agreement is explicit in that no managerial duty is placed in his hands but that it is optional with him, and, therefore, plaintiff did not breach the agreement by his continued absence from Guam.

B. Even if it is assumed that plaintiff was under a contractual duty to act as manager of the partnership business, plaintiff contends said duty was fully performed by him under any concept of the nature of the agreement in that:

(1) The agreement does not specifically require that plaintiff devote his personal attention or services alone nor is a managership of business of this type one that customarily precludes delegation of performance to agents and employees, and

(2) In any construction of the agreement it is contended that by defendant's failure to take positive action in objecting to plaintiff's management of the business by delegation of such duties to his agents and employees and by accepting the benefit of such performance, the defendant has waived any rights that it may have by virtue of plaintiff's absence from Guam.

Section 160 (3) and Section 162 (2) of the Restatement of the Law of Contracts states the general rule. The applicable portions of these sections are as follows:

"Section 160. Delegation of Performance of a Duty or a Condition. * * *

(3) Performance or offer of performance by a person delegated has the same legal effect as performance or offer of performance by the person named in the contract, unless,

(a) performance by the person delegated varies or would vary materially from performance by the person named in the contract as the one to perform, and there has been no such assent to the delegation as is stated in Section 162, or

(b) the delegation is forbidden by statute or by the policy of the common law, or

(c) the delegation is prohibited by contract."

"Section 162. Assent to Assignment of a Right or to Delegation of a Duty as Precluding Subsequent Objection. * * *

(2) If such assent is manifested after the creation of a contract, the assent is similarly effective if it is given for sufficient consideration or the facts are such that an informal promise would be binding, or if, in reasonable reliance on the manifestation, a material change of position takes place."

Also, Sections 2304 and 2349 of the Guam Civil Code (*California Civil Code* Sections 2304 and 2349) provide in full as follows:

"Section 2304. What Authority May Be Conferred. An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention."

"Section 2349. Agent's Delegation of Powers. An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:

1. When the act to be done is purely mechanical;
2. When it is such as the agent cannot himself, and the subagent can lawfully perform;
3. When it is the usage of the place to delegate such powers; or,
4. When such delegation is specially authorized by the principal."

The law of partnership has been said to be a branch of the law of agency. (See *Swan v. Smith* (1929) 102 C.A. 541, at 544, 283 P. 829.) It is generally conceded that the functions, duties, rights and liabilities of the partners in a great measure comprehend those of agents. (See *Berringer v. Krueger* (1924), 69 C.A. 711, 232 P. 467; *Furlow Pressed Brick Co. v. Balboa Land and Water Co.* (1921), 186 C. 754, 267 P. 114.)

The Uniform Partnership Act, Section 9 (1), apparently follows the common law in this regard. (Codified as Section 2403 (1), Guam Civil Code, and Section 15009 (1), California Corporations Code.) (*MacLeod v. Foxwest Coast Theatre Corp.* (1937), 10 Cal. (2d) 383, 74 P. (2d) 276; *Refinite Sales Co. v. Bright Co.* (1953), 119 C.A. (2d) 56, 258 P. (2d) 1116.)

Section 2403 (1), Guam Civil Code, provides as follows:

> "Section 2403. Partner, Agent of Partnership as to Partnership Business. (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority. * * *"

However, the sole management of a partnership may by agreement be vested in one partner. (*McAlpine v. Miller* (1908), 104 Minn. 289, 116 N.W. 583; 68 C.J.S. 576.) A manager or a partner has been held as possessing power to appoint third persons as agents, or employees, to conduct partnership business. (*State Compensation Ins. Fund v. Industrial Accident Commission* (1933), 28 C.A. (2d) 474, 82 P. (2d) 732.) It has also been held that where the only resident partner is obliged to be absent for a time, he may employ a general agent without consulting the others. (*Bank of North America v. Embury, N.Y.* (1861), 33 Barb. 323, 21 How. Pr.)

Thus, it may be concluded that applying the law of contracts, partnership, and agency to the situation as presented here, any duties assumed by plaintiff were performed by delegation to his agents and employees. There is nothing in the agreement which indicates that plaintiff's physical presence is manda-

tory, nor is there any express or implied prohibition contained therein against delegation of managership duties. There is no statute or law preventing such delegation, and, in addition, there is no evidence that the performance actually rendered by plaintiff's agents and employees was materially different from that which was expected from plaintiff. (See Restate., Contracts, Section 160 (4), supra; see also *LaPue v. Groezinger* (1890), 84 C. 281, 24 P. 42.)

In addition, plaintiff contends that the operation of the business by his agents and employees produced a substantial profit, and although defendant apparently was dissatisfied with plaintiff's extended absence, no action was taken by defendant to assume active control of the management until April 1953, some ten (10) months after plaintiff had assumed the task of management. During this period defendant accepted the benefits of the operation of the business and has thereby waived any rights it may have under the agreement.

In summation, the partnership agreement clearly and unambiguously provides that plaintiff is to devote such time as may be mutually agreed upon. No such agreement was ever reached, and, therefore, plaintiff was not bound to remain in Guam and did not breach the partnership agreement, or any other agreement, by his absence.

In addition, whatever obligations plaintiff did assume were performed by plaintiff through his agents and employees. Defendant knew this and failed to manifest a timely objection. Plaintiff was never noti-

fied to return to Guam or be held in breach by defendant. Defendant accepted the substantial profits made by the firm during the period of plaintiff's absence and thereby should be deemed to have waived whatever objection it had to plaintiff's absence.

II. THE LOWER COURT ERRED IN FAILING TO HOLD THAT THE DEFENDANT BREACHED THE PARTNERSHIP AGREEMENT AS OF JULY 1, 1953, WHEN IT EXCLUDED PLAINTIFF FROM PARTICIPATION IN THE PARTNERSHIP BUSINESS AND TOOK UNTO ITSELF ALL OF THE PARTNERSHIP PROFITS AND ASSETS.

The trial court held that defects in current management warranted the defendant in assuming management control of the business. However, regardless of whether the defendant was warranted as an equal partner in assuming management of the partnership business, its activities thereafter amounted to a clear breach of the partnership contract. Taking possession of all of the partnership assets and money, failing to account to the plaintiff, diversion of funds, rewriting the books and creating adverse interests by financing competing businesses are clearly in violation of the contract and of partnership principles.

Plaintiff does not contend that the defendant had no right to assert its voice in the control and management of the partnership business, even though the operation was, prior to such assertion, a financial success. However, plaintiff respectfully contends that the trial court erred in holding in its Conclusions of Law, filed April 7, 1955, as part of the final judgment

(Transcript of Record, Vol. I, pp. 110, 113), that plaintiff acquiesced to his exclusion from the partnership.

Plaintiff believes rather that all the evidence shows a breach by defendant of the partnership agreement, and the findings based upon such evidence were made to that effect, but the trial court erred in failing to conclude as a matter of law that defendant wrongfully breached the partnership agreement.

In support of the above, the lower court in its Memorandum Opinion at page 100 of the Transcript of Record, Volume I, states that:

> "* * * the defendant indulged in what the court characterized as a 'fiction' and attempted to nullify the agreements upon the ground that its board of directors had not ratified them. The defendant took full advantage of the services being performed by Pacific Enterprises, Inc., (plaintiff's corporate enterprise) and accepted the benefits of a successful operation * * *"

The lower court also found as a fact that as of July 1, 1953, the defendant took full and exclusive control of the business, established its own books, reflecting ownership as a corporate asset of defendant, and completely excluding plaintiff as a partner as of that time. (Transcript of Record, Vol. I, p. 102.)

In its supplemental findings of fact, filed April 7, 1955, the lower court also found that the defendant used capital and profits of the partnership business

to invest in a competing business named Guam Frozen Products, Inc., which was competitive to the partnership. (Transcript of Record, Vol. I, p. 112.) The evidence shows, from the testimony of defendant's president, that defendant took approximately seventy per cent (70%) of the capital stock of this competing business in its own corporate name. (Transcript of Record, Vol. II, p. 265.)

Based upon the above, plaintiff contends that the dissolution should be decreed because of his wrongful exclusion from participation in the partnership business and relies upon the following authority: *Zeibak v. Nasser* (1938), 12 Cal. (2d) 1, 82 P. (2d) 375; *Gorman v. Russell* (1860), 14 Cal. 531; *Thompson v. Langton* (1921), 51 C.A. 142, 196 P. 103; *Mills v. Williams* (1925), 113 Ore. 528, 233 P. 542; *Beller v. Murphy* (1910), 139 Mo. App. 663, 123 S.W. 1029.

In addition, the dissolution should be based upon the wrongful diversion by defendant of partnership capital and profits into a competing business to the exclusion and detriment of plaintiff and the partnership. Guam Civil Code Section 2415 (1) provides as follows:

> "Section 2415. Partner Accountable as a Fiduciary. (1) Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.
>
> (2) * * *"

It would appear indisputably that such breaches of the fiduciary relation are proper grounds for dissolution and an accounting. Guam Civil Code Section 2416 (c) provides as follows:

> "Section 2416. Right to An Account. Any partner shall have the right to a formal account as to partnership affairs:
>
> (a) * * *
>
> (c) As provided by Section 2415,
>
> (d) * * *"

The cases uniformly support this contention. (*Llewelyn v. Levi* (1909), 157 Cal. 31, 37, 106 P. 219; *Dennis v. Gordon* (1912), 163 Cal. 427, 125 P. 1063; *Donleavey v. Johnston* (1914), 24 C.A. 319, 141 P. 229.)

Plaintiff contends there is no evidence that even suggests that he acquiesced to his exclusion from participation in the partnership or that he agreed that the partnership should be terminated without an accounting and settlement of his interest therein. Plaintiff's only acquiescence was to the assumption by defendant of dominant control, but this cannot, in fact or in law, be construed as an intent to abandon or relinquish the business in favor of the defendant. (See *Lanpher v. Warshauer* (1915), 28 C.A. 457, 152 P. 933; *Carrie v. Cloverdale etc., Co.* (1891), 90 Cal. 84, 27 P. 58; *Bernheim v. Porter,* 2 Cal. Unrep. 349, 4 P. 446.)

In the *Lanpher* case, supra, the plaintiff there had agreed to build and construct dwellings using defend-

ant's capital, both to share the profits. The defendant contended that the plaintiff lost his rights to an accounting by failing to continue the building operation. However, the court stated on page 460, that a partnership is not dissolved by the failure on the part of one member in some respect to perform his duty or obligation to it, or that he loses thereby his rights to an accounting and settlement by a court of equity.

Certainly, plaintiff's relinquishment of management control should not constitute grounds for dissolution or amount to an abandonment of his rights, as an innocent partner, in equity.

Although the lower court concluded as a matter of law in its conclusions of law that plaintiff had acquiesced to his exclusion (Transcript of Record, Vol. I, p. 113), since the record fails to contain any evidence to support this finding, it should be overruled by this Court. (*Robinson v. Bowe* (1934, 8th Cir.), 73 Fed. (2d) 238; *Crawford v. Southern Pacific Co.* (1935), 3 Cal. (2d) 427, 429, 45 P. (2d) 183; *Boss v. Sugarland Industry* (1931, 5th Cir.), 50 Fed. (2d) 65.)

III. THE LOWER COURT ERRED IN HOLDING THAT THE PARTNERSHIP WAS DISSOLVED AS OF JULY 1, 1953, INSTEAD OF THE DATE OF THE COURT ORDER DISSOLVING THE SAME (FEBRUARY 18, 1955).

The applicable law in the case at bar is the Guam Partnership statute, derived from identical statutes in California, and is the Uniform Partnership

Act. Under these circumstances a partnership for a fixed term is not dissolved by an act in contravention of the partnership by an order of court, the act merely giving rise to a cause of action. In the instant case the act in contravention of the partnership was by the defendant, yet the judgment of the court would permit him to profit by such act in declaring a dissolution as of the date of the act and thereby forfeiting all of plaintiff's interest in future profits and in partnership assets.

Plaintiff filed his action for dissolution and an accounting in September 1954. On February 18, 1955, the lower court issued an interlocutory order which purported to dissolve the partnership as of that date. (Transcript of Record, Vol. I, p. 94.) However, in the final judgment the court fixed July 1, 1953, as the date of dissolution and purported to fix the plaintiff's interest in the partnership as of that date. (Transcript of Record, Vol. I, p. 113.)

Plaintiff contends that under the Guam laws pertaining to partnerships a partnership for a fixed term is not dissolved by the express will of one partner alone. Guam Civil Code Section 2425 provides as follows:

> "Section 2425. Causes of Dissolution. Dissolution is caused:
>
> (1) Without violation of the agreement between the partners:
>
> (a) By the termination of the definite term or particular undertaking specified on the agreement;

(b) By the express will of any partner when no definite term or particular undertaking is specified;

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking;

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners.

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of the court under Section 2426."

Certainly, in this case, since the partnership was created for a term of fifty (50) years (Articles of Copartnership, Transcript of Record, Vol. I, p. 9), it could only be dissolved by decree of court under Section 2425(6) above.

In *Zeibak v. Nasser* (1938) 12 Cal. (2d) 1, at page 16, (82 P. (2d) 375), the court discussed the same problem. There, the plaintiff had conducted himself in a manner that gave rise to grounds for dissolution of the partnership or joint venture. The date of such conduct was found to have occurred as of December 11, 1932, by the trial court's findings. The trial court in that case, however, by minute order declared the partnership dissolved as of the date of the order, to wit: July 20, 1934. The defendants there appealed on the ground that the partnership was dissolved *ipso facto* on the earlier date.

The California Supreme Court upheld the trial court's determination that the date of dissolution when effected by judicial decree is not the date when facts forming the basis for such dissolution occur but, rather, when there is a judicial determination that such facts exist. In so holding, the Supreme Court in the *Zeibak* case, supra, cited the following cases that hold that for purposes of determination of a partner's interest and for dissolution of a partnership by equity, the date of dissolution is the date of judicial determination and order thereto: *Beller v. Murphy* (1910) 139 Mo. App. 663, 123 S.W. 1029; *Carrey v. Haun,* 111 Ore. 586, 227 P. 315; *Hartman v. Woeher,* 18 N.J. Eq. 383; *Smith v. Smith,* 183 S.W. 1126 (Mo. App.); (see 68 C.J.S. 849).

The *Zeibak* case, supra, also held that the partnership or joint venture in that case was not dissolved *ipso facto* on the additional grounds asserted by defendants that the plaintiff there was treated and con-

sidered as no longer a partner or person with any interest in the venture. (12 Cal. (2d) 1, at page 16.)

The language of the opinion makes it clear that mere treatment or belief of status is not a factor in determining the date of dissolution. Rather, the court's analysis of equity's dissolution of a partnership parallels the basic legal theory of a dissolution or divorce of marital status. Although a cause of action exists for divorce, the marriage is not legally severed until the facts establishing the cause of action are judicially determined and, when so determined, the date of severance of the marriage bond is the date of the judicial decree and not the date of the happenings upon which the decree is based. (*Corbett v. Corbett* (1931) 113 C.A. 595, 298 P. 819.)

It will be noted that in the *Zeibak* case (12 Cal. (2d) 1, 82 P. (2d) 375) the plaintiff was the wrongdoer between the partners. Plaintiff contends in this action that he was not the wrongdoer and, therefore, is entitled to more protection in a court of equity than the plaintiff received in the *Zeibak* case, supra.

IV. THE LOWER COURT ERRED IN FAILING TO ORDER A COMPLETE ACCOUNTING OF THE AFFAIRS OF THE PARTNERSHIP DURING THE PERIOD THEY WERE DIRECTED BY THE DEFENDANT.

Although the accounts of the plaintiff during the time of his management are admitted as accurate, no accounting was required of the defendant for his management of partnership affairs. Thus, the court

and the plaintiff are without knowledge as to the status of the partnership business, its assets or liabilities and the extent to which its assets are dissipated.

The trial court in its supplemental findings of fact and conclusions of law (Transcript of Record, Vol. I, p. 110) found that the defendant had accepted as correct the monthly financial statements prepared by plaintiff's bookkeeper from the date the business commenced until May 31, 1953. The June 1953 statement was never submitted by defendant who was then in control of the business. (Transcript of Record, Vol. I, p. 110.) The lower court did not order any accounting of the business subsequent to the date of plaintiff's exclusion from the partnership, to wit: July 1, 1953.

In this, the plaintiff contends, the trial court erred. An accounting means there is to be a complete winding up of the affairs of the partnership. (*Albery v. Geis* (1905) 1 C. A. 381, 82 P. 262.) The accounting should include all assets and profits up to the date of dissolution, to wit: February 18, 1955, and not just until the date of plaintiff's exclusion.

In *Alechoff v. Edwards* (1921) 55 C.A. 277, 279 (203 P. 415), the court held that in an action for dissolution of a partnership and for an accounting based upon the wrongful act of the defendant in taking exclusive possession of the business and the property, an accounting up to the date of the filing of the interlocutory decree was proper. This is so, the court held, regardless of whether the dissolution occurred when defendant took exclusive possession or when the de-

cree was entered, since the defendant, having assumed the responsibility of liquidation of the affairs of the partnership, should not be permitted to escape a complete accounting.

The present case is completely analogous. The defendant, under the terms of the partnership agreement, could have dissolved the partnership by giving the requisite notice as provided therein. Alternatively, if it felt it had sufficient reason, it could have applied to a court of equity for dissolution of the partnership.

Defendant chose neither course. By a legal fiction it attempted to disclaim the partnership agreement and thereby keep unto itself all profits and appreciation of the assets of the partnership. It next altered the books of the partnership to reflect corporate ownership from the beginning of the business. It even invested partnership funds in another competing corporation and received stock therein in its own name. It refused and failed to recognize any rights of plaintiff after July 1, 1953, except, possibly, as to his original contribution of Fifteen Thousand Dollars ($15,000.00).

To terminate the accounting at the date of exclusion (July 1, 1953) permits the defendant to use plaintiff's interest in the partnership to produce profits for its own sole use and benefit.

A partner is a fiduciary and is accountable to the partnership for any benefit obtained from any transaction connected with the formation, conduct or liquidation of the partnership or any use by him of its property. (Guam Civil Code, section 2415 (1).) As

such, he is trustee for the benefit of the partnership. (*Air Purification, Inc. v. Carle* (1950) 99 C.A. (2d) 258, 221 P. (2d) 700.)

Plaintiff thereby contends the trial court erred by not awarding plaintiff his pro-rata share in any and all assets, in addition to all profits that belong to the partnership, including the interest in Guam Frozen Products, Inc., taken in the name of defendant. Such interest, paid out of partnership funds, is partnership property (*Roberts v. Eldred* (1887) 73 Cal. 394, 397, 15 P. 16; *Rishwain v. Smith* (1947) 77 C.A. (2d) 524, 534, 175 P. (2d) 555) and is held in trust for the benefit of the partnership (*Swarthout v. Gentry* (1934) 62 C.A. (2d) 68, 78, 144 P. (2d) 38; *Rishwain v. Smith,* supra, at page 534).

Only a complete accounting up to the date of judicial dissolution, to wit: February 18, 1955, can determine the value and extent of plaintiff's partnership interest.

V. THE LOWER COURT ERRED IN FAILING TO REQUIRE A WINDING-UP OF THE PARTNERSHIP BUSINESS UNDER THE CONTROL OF A RECEIVER AND THE SALE AND/OR DISTRIBUTION OF ITS ASSETS TO THE PARTIES.

The lower court not only allowed the defendant all of the profits of the business from July 1, 1953, but also has left the partnership business in the hands of the defendant without winding up the affairs of the partnership by sale and distribution. In fact, the judgment of the court would require the plaintiff to assign his share of the partnership business to the defendant.

Section 2424 of the Guam Civil Code provides as follows:

> "Section 2424. Partnership Not Terminated By Dissolution. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

Plaintiff contends that the lower court, after ordering the dissolution, failed to wind up the affairs of the partnership by not ordering a sale or distribution of its assets to the parties in accordance with their partnership interest. The court erred also in failing to consider the request of plaintiff that a receiver be appointed to cause said winding-up and termination of the partnership. (Amended Complaint, Transcript of Record, Vol. I, p. 28.)

Rather, the plaintiff was awarded only his pro-rata share of profits to the date of his exclusion, to wit: July 1, 1953, together with the return of his original investment, plus interest. Also, the lower court's judgment provided that defendant was entitled, after payment of the above judgment, to have transferred to it all of plaintiff's interest in the partnership assets. (Transcript of Record, Vol. I, p. 113.)

As a general rule the court, after an accounting, should require the partnership property to be sold. The net proceeds of such sale are then divided among the partners. An exception to the rule is the situation where it is fair and convenient to order a division of the assets in kind. (*Shuken v. Cohen* (1918) 179 Cal. 279, 176 P. 447; *Swarthout v. Gentry* (1943) 62 C. A. (2d) 68, 144 P. (2d) 38.)

The lower court's decision in this case followed neither alternative. Plaintiff contends he is entitled to a complete accounting of all the affairs of the partnership and is also entitled to the appointment of a receiver to prevent the dissipation of the assets. (*Breedlove v. Breedlove Excavating Co.* (1942) 56 C.A. (2d) 141, 132 P. (2d) 239.) Plaintiff also contends that all the assets should be marshalled and either sold and the net proceeds distributed or there be ordered a distribution in kind. (*Swarthout v. Gentry,* supra.)

VI. THE LOWER COURT ERRED IN AWARDING PLAINTIFF ONLY THE RETURN OF HIS ORIGINAL INVESTMENT, PLUS INTEREST, PLUS A SHARE OF THE PROFITS TO JULY 1, 1953, AND BY FAILING TO ALLOW PLAINTIFF A SHARE OF THE PROFITS SUBSEQUENT TO JULY 1, 1953, AND A SHARE OF THE TANGIBLE ASSETS OF THE PARTNERSHIP BUSINESS.

The effect of the judgment of the court is to forfeit all of the plaintiff's interest in the partnership assets by returning to him his original investment only. Thus, in addition to being excluded from profits from July 1, 1953, any appreciation in the capital value of the assets would accrue only to the benefit of the defendant. This is an improper application of the partnership laws, even though the dissolution were caused by act of the plaintiff, whereas in this case dissolution was in fact caused by act of the defendant.

A. *Partner entitled to his share of all assets.* Plaintiff invested Fifteen Thousand Dollars ($15,000.00) cash and other value into the partnership in return for a fifty per cent (50%) interest. By the

lower court's final decision (Transcript of Record, Vol. I, pp. 110-113) the defendant was able to successfully dissolve the partnership, then a profitable and successful business, by excluding plaintiff. The lower court only awarded plaintiff his original cash investment, plus interest, and thereby excluded him from any participation in his property interest in the business.

Plaintiff contends that the trial court erred in this award for it failed to recognize the rule that a partner's interest in a partnership is not a fixed monetary sum determined by the original contribution. Rather, it is a contribution which creates a proportionate interest in the venture which can appreciate or depreciate in value, depending upon the economic factors which affect the partnership as a business venture. Section 2402, Guam Civil Code, provides as follows:

> "Section 2402. Partnership Property. (1) All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property.
>
> (2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.
>
> (3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.
>
> (4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears."

(See also Guam Civil Code Section 2412(a), 2420 and 2434(a).)

A simple factual situation is illustrative of the above principle. A and B enter into a partnership. Their sole contributions consist of one-half each of the purchase price of a piece of land which they intend to hold as a speculative investment. After a period of time the value of the land increases from Ten Thousand Dollars ($10,000.00), the purchase price, to Twenty-five Thousand Dollars ($25,000.00). Even though A may be guilty of conduct which gives rise to a right in behalf of B to apply for dissolution, A does not lose the right to his one-half interest in the land at its present increased evaluation. (*Zeibak v. Nasser* (1938), 12 Cal. (2d) 1, 82 P. (2d) 375; *Gardner v. Shreve* (1949), 89 C.A. (2d) 804, 808, 202 P. (2d) 322, citing California Civil Code, Section 2432 (2) (now California Corporations Code, Section 15038 (2), which is the same as Guam Civil Code, Section 2432 (2).)

In the *Zeibak* case, supra, the plaintiff was held to have wrongfully caused the dissolution of the joint venture. However, it was recognized by the court that plaintiff was nonetheless entitled to the value of his partnership interest and not just a return of his original investment.

In the present case no attempt was made to evaluate the plaintiff's interest. On the contrary, the court merely awarded him his original investment, plus interest from July 1, 1953, date.

In view of the language of the Uniform Partnership Act, plaintiff contends the trial court should have ordered the property appraised as of the date of dissolution. If defendant is entitled to continue possession of the assets under Guam Civil Code Section 2432 (2), then plaintiff is entitled to the value of his share.

Under the Uniform Partnership Act even the partner wrongfully causing dissolution is only subject to loss of the good will and damages, if any. (Guam Civil Code 2432 (2).) He does not forfeit his interest in the partnership. (*Gardner v. Shreve* (1949), 89 C.A. (2d) 804, 202 P. (2d) 322.)

B. *Partner entitled to pro-rata share of profits.* Plaintiff contends the lower court erred in that it failed to award him his *pro-rata* share of all profits earned up to February 18, 1955. Plaintiff was awarded his share of assets up to July 1, 1953, the date of his exclusion from the partnership. (Transcript of Record, Vol. I, p. 112.) The reasoning for the court's failure to award profit past that date was apparently predicated upon its determination that July 1, 1953, was the proper date of dissolution.

However, plaintiff contends that, as hereinbefore argued, the partnership was properly dissolved as of February 18, 1955, by the court's interlocutory order (Transcript of Record, Vol. I, p. 94), and plaintiff's interest in earned profits should be determined as of that date, rather than the date of his exclusion, to wit: July 1, 1953.

Zeibak v. Nasser (1938), 12 Cal. (2d) 1, 82 P. (2d) 375, is authority for the proposition that a partnership not dissolved by its partners by terms of the agreement or a partnership for a fixed term (contrasted to one at will) must be dissolved by judicial decree. And being so dissolved, the proper date is the date of the decree and not any prior date of happenings that may have given rise to the cause of action for dissolution. (*Zeibak* case, supra, 12 Cal. (2d) 1, at page 16.)

In *Hartman v. Woeher,* 18 N.J.Eq. 383, cited in the *Zeibak* case, supra, 12 Cal. (2d) 1, at page 16, the court said as follows:

> "If part of the capital of an agreed partnership has been paid, accepted, and used, and the business has been commenced in the name of the firm, he is an actual partner until the partnership is legally dissolved, and a mere exclusion of such person by the others from the business of the firm by illegal acts on their part is not a legal dissolution, but is a ground for an application to a court of equity for a dissolution upon his part, and, until such dissolution is had, he is entitled on an accounting, to his share of the profits."

The *Zeibak* case followed this principle of partnership law, and its reasoning is particularly applicable to this case. To exclude the plaintiff from the profits earned by the Dairy Queen from its inception would permit the defendant to wrongfully use the partnership assets to its own sole use and benefit to the detriment of plaintiff.

Even if it be assumed for the purpose of discussion that in this case the date of dissolution was properly fixed by the lower court at July 1, 1953, plaintiff contends that he is still entitled to profits earned subsequent to July 1, 1953.

The general rule is that a partner cannot continue to use partnership property for his own sole use and benefit without being accountable therefor to the partner who, for one reason or another, has not received his distributive share and is not in possession of the partnership property. The operation of this rule permits the excluded partner to a full accounting and his election thereafter to his pro-rata share of profits or interest.

Plaintiff's authority for the above is initially Guam Civil Code Sections 2415 (1) and 2436 (same as California Corporations Code Sections 15021 (1) and 15042) which provide as follows:

> "Section 2415. Partner Accountable as a Fiduciary. (1) Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.
>
> (2) * * * "
>
> "Section 2436. Rights of Retiring or Estate of Deceased Partner When the Business is Continued. When any partner retires or dies, and the business is continued under any of the conditions set forth in Section 2435 (1), (2), (3), (5),

(6), or Section 2432 (2) (b) without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnerships may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option, or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership: Provided, That the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by Section 2435 (8) of this code."

For a general and exhaustive review of the right to profits after dissolution of a partnership, see 80 ALR 12, et seq., and 2 ALR (2d) 1084. The following cases support this view in California before and after passage of the Uniform Partnership Act (Stats 1929, Ch 864, p. 1897): *Mosley v. Mosley* (1952 9th Circ.), 196 Fed. (2d) 663; *Nuland v. Pruyn* (1950), 99 C.A. (2d) 603, 613, 222 P. (2d) 261; *Hall v. Watson* (1946), 73 C.A. (2d) 735, 167 P. (2d) 210; *Puppee v. Utter* (1925), 76 C.A. 19, 243 P. 715; *Painter v. Painter,* 4 Cal. Unrep. 636, 36 P. 865.

VII. THE LOWER COURT ERRED IN FAILING TO APPRAISE THE VALUE OF THE GOOD WILL OF THE PARTNERSHIP BUSINESS AND TO AWARD THE SAME TO THE PLAINTIFF AS INNOCENT PARTY TO THE DISSOLUTION.

Under the partnership law of Guam the innocent party is entitled to the value of the good will of the business upon the sale and distribution of the assets. The basis of such rule undoubtedly is that the innocent party has contributed to the good will, whereas the guilty party has injured the good will of the partnership business by his conduct. In the case at bar plaintiff's employees managed the business and created a large measure of the value of the business by operating the same at a profit and otherwise building up good will with the public. The acts of the defendant have tended to destroy the good will of the business so that, in addition to causing the dissolution of the partnership, the defendant's act in contravention of the agreement have in fact harmed the partnership, and whatever value of good will remains should be awarded to the plaintiff.

The lower court by its decision and judgment awarded defendant, in addition to the tangible assets, the good will of the partnership business. This asset was not appraised and plaintiff was accorded no interest therein.

The lower court held that "* * * 2. The partnership of the parties was dissolved by exclusion of the plaintiff because of his breach and acquiescence in such exclusion as of July 1, 1953." (Transcript of Record, Vol. I, p. 113.) Plaintiff has argued herein that there is no evidence to show any acquiescence to

his exclusion from the partnership, that he did not breach the agreement, and dissolution should have been based upon defendant's wrongful exclusion of plaintiff from the partnership. (*Zeibak v. Nasser* (1938), 12 Cal. (2d) 1, 82 P. (2d) 375; *Gorman v. Russell* (1860), 14 Cal. 431; *Thomson v. Langton* (1921), 51 C.A. 142, 196 P. 103; *Mills v. Williams* (1925), 113 Ore. 528, 233 P. 542; *Beller v. Murphy* (1910), 139 Mo. App. 663, 123 S.W. 1029.)

Plaintiff contends also that the lower court erred in failing to find and hold that defendant wrongfully caused the dissolution by diversion of partnership funds into a competing business. (*Llewelyn v. Levi* (1909), 157 Cal. 31, 37, 106 P. 219; *Dennis v. Gordon* (1912), 163 C. 427, 125 P. 1063; *Donleavy v. Johnston* (1914), 24 C.A. 319, 141 P. 229.)

The evidence to show this diversion of partnership funds is clear and uncontroverted. (Transcript of Record, Vol. I, p. 112; Vol. II, p. 265.)

As innocent party to the dissolution, plaintiff respectfully contends that he is entitled to the entire appraised valuation of the good will. Guam Civil Code, Section 2432 (2) (c) provides as follows:

> "Section 2432. Rights of Partners to Application of Partnership Property. * * *
>
> (2) (c) A partner who has caused the dissolution wrongfully shall have: * * *
>
> II. If the business is continued under paragraph (2) (b) of this section the right as against his copartners and all claiming through them in respect of their interest in the partnership to have

the value of the interest in the partnership less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; *but in ascertaining the value of the partner's interest the value of the good will of the business shall not be considered.*" (Emphasis added.)

Zeibak v. Nasser (1938), 12 Cal. (2d) 1, at page 8, 82 P. (2d) 375, and *Gardner v. Shreve* (1949), 89 C.A. (2d) 804, 202 P. (2d) 322, have both interpreted this provision which seems clear in its effect.

Any other result would permit the defendant to possess and benefit solely from the good will that plaintiff and his agents and employees established in the year prior to the plaintiff's exclusion from the partnership by defendant.

Dated, January 18, 1956.

Respectfully submitted,
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